UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al., Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant.	Case No. 1:08-CV-00827-LMB-JFA

REPLY IN SUPPORT OF DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs finally acknowledge that "the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting." Pl. Opp. at 31 n.30. Thus, after nine years, Plaintiffs have conceded that they are not alleging any CACI PT employee directly mistreated them.[1] They do not accuse any CACI PT employee of torturing them, subjecting them to cruel, inhuman, and degrading treatment ("CIDT"), or of committing a war crime. This entire action hinges on the premise that CACI PT made the corporate decision to conspire with soldiers who allegedly mistreated Plaintiffs, or that CACI PT employees entered into such a conspiracy and CACI PT is liable for acts of the employees' alleged co-conspirators. As CACI PT has long maintained, after Plaintiffs have received all the discovery they sought, there is NO evidence that any CACI PT interrogator had a role in any abuse of these Plaintiffs. Equally significant, Plaintiffs have not alleged facts showing how CACI PT or its employees entered into the amorphous conspiracy on which they rely, or how whoever allegedly mistreated them supposedly entered into the same conspiracy.

Plaintiffs barely bother to defend the justiciability of their claims, relying instead on an assertion that CACI PT employees acted unlawfully without any support for that legal conclusion. Plaintiffs then argue against the very definitions of torture, CIDT, and war crimes that *they* proposed and the Court adopted. Plaintiffs are, however, bound by those standards, and when applied here those standards lead to the conclusion that Plaintiffs' allegations of abuse, while reprehensible, simply do not rise to the level of torture, CIDT or war crimes. Those offenses require a certain gravity, involving extreme, deliberate and unusually cruel practices absent here. Finally, Plaintiffs' displacement/preemption arguments ignore the plain language of the authorities supporting dismissal. The Court should dismiss Plaintiffs' claims.

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[1] The Third Amended Complaint ("TAC") identifies three instances of "direct contact" between Plaintiffs and CACI PT personnel, all of which are innocuous. Pl. Opp. at 31 n.30

II. ANALYSIS

A. The Political Question Doctrine Precludes Judicial Review

From reading Plaintiffs' opposition, one would never know that this case was remanded for consideration of justiciability issues specified by the Fourth Circuit – a "discriminating analysis [that] will require the district court to examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) ("*Al Shimari IV*"); *see also Warfaa v. Ali*, 33 F. Supp. 3d 653, 660 (E.D. Va. 2014), *aff'd*, 811 F.3d 653 (4th Cir. 2016). Indeed, CACI PT sought clarification as to whether the parties should address political question in this motion and the Court confirmed that they should. Dkt. #620.

Nevertheless, Plaintiffs devote *one page* of their opposition to justiciability. They do not dispute that they have the burden of demonstrating justiciability, and do not seriously contest the military's direct and plenary control over CACI PT interrogators. Pl. Opp. at 30. Plaintiffs ignore the detailed deposition testimony from Major Holmes, the boots-on-the-ground officer overseeing interrogations at Abu Ghraib prison, as well as others, about the Army's control over military and CACI PT interrogators. CACI PT Mem. at 7-9. Plaintiffs devote most of their single page of analysis to arguing that their claims fit within the "unlawfulness" exception to the political question doctrine adopted in *Al Shimari IV*, 840 F.3d at 159. That misses the point.

The Fourth Circuit's "unlawfulness" inquiry focuses on whether Plaintiffs' claims involve unlawful conduct *by CACI employees*. *Id.* ("[A]ny acts *of CACI employees* that were unlawful when committed . . . are subject to judicial review." (emphasis added)). Contrary to Plaintiffs' intimation (Pl. Opp. at 29), CACI PT is *not* arguing that Plaintiffs must show that CACI PT employees directly injured Plaintiffs through unlawful conduct, but rather that

Plaintiffs must identify conduct *by CACI PT employees*, direct or conspiratorial, that is both (1) unlawful, and (2) connected by facts to mistreatment allegedly suffered by these Plaintiffs.

As CACI PT explained (CACI PT Mem. at 5), and Plaintiffs have not disputed, Plaintiffs have the burden of establishing unlawful conduct by CACI PT connected with their alleged mistreatment. Unlike CACI PT, Plaintiffs received the discovery they sought regarding their treatment at Abu Ghraib prison, and have not asserted a need for additional discovery to address justiciability. On the existing record, Plaintiffs cannot meet their burden of establishing justiciability because they cannot show a causal chain between any alleged unlawful conduct by CACI PT personnel and Plaintiffs' alleged mistreatment. Plaintiffs admit that they do not allege direct mistreatment by CACI PT personnel. With respect to their conspiracy and aiding and abetting theories, all Plaintiffs can show are allegations (not even facts) that a few individual CACI PT employees engaged in discrete acts of misconduct *not involving these Plaintiffs*.

Allegations of parallel misconduct do not get conspiracy theories of liability past the pleading stage (*see* Section II.C, *infra*), much less establish jurisdiction under the fact-based "discriminating analysis [of] the evidence" mandated by the Fourth Circuit. *Id.* at 160-61; *see also Baker v. Carr*, 369 U.S. 186, 217 (1962) (political inquiry analysis requires "discriminating inquiry into the precise facts and posture" of a case). Absent facts showing that an unlawful action by a CACI PT employee caused them injury, Plaintiffs cannot meet their burden for showing that their claims involve "acts of CACI employees that were unlawful when committed," *Al Shimari IV*, 840 F.3d at 159, and Plaintiffs have not seriously contested any other aspects of the political question inquiry. Accordingly, dismissal is required.

If for any reason the Court declines to dismiss this case, we note that, unlike Plaintiffs, CACI PT *has not* been afforded the opportunity to take the discovery necessary for CACI PT to

address the fact-based inquiry directed by the Fourth Circuit. *Id.* at 160. Plaintiffs claim to have been interrogated, but also claim not to know who interrogated them. Because of the Army's control over the interrogation mission, CACI PT does not know if these Plaintiffs were interrogated, and if so by whom. As a result, there is no evidence from any interrogator or MP who has any information at all about these Plaintiffs,[2] and CACI PT has not yet been permitted to discover the identity of persons who participated in any interrogations of these Plaintiffs.[3]

Two recent political question decisions illustrate the typical degree of factual development involved in a political question analysis. In *Burn Pit*, the district court dismissed the plaintiffs' claims under the Fourth Circuit's political question test. *In re KBR, Inc. Burn Pit Litig.*, No. 8:09-md-2083, 2017 WL 3066200, at *32 (D. Md. July 19, 2017). The court involved the United States, a non-party, in discovery "not only because it is in possession of significant information that may be dispositive of the conflicting claims made by the parties . . . but also due to the significant potential for a burden on military operations of the United States." *Id.* at *7. Ultimately, jurisdictional discovery included the production of millions of pages of documents regarding relevant operations, and "the parties took thirty-four depositions of various witnesses on the jurisdictional questions, including military personnel in both the operational and contracting commands." *Id.* at *8. In *Salim v. Mitchell*, No. CV-15-286, 2017 WL 3389011, at *4 (E.D. Wash. Aug. 7, 2017), the Court had over 200 pages of statements of fact and had detailed evidence, from government witnesses and documents, as to virtually every aspect of the plaintiffs' incarceration, interrogation, and treatment. *Id.* at *1-4. These courts were able to

[2] The MPs deposed did not know Plaintiffs. If Plaintiffs were interrogated, their interrogators have not been deposed because their identities are known only to the United States.

[3] Plaintiffs say that "CACI does not question the credibility of Plaintiffs' accounts of mistreatment" (Pl. Opp. at 24), an ironic argument given that CACI PT has been prevented from taking evidence from the United States to identify other witnesses regarding Plaintiffs' treatment.

assess justiciability based on detailed knowledge of exactly what happened to the plaintiffs and how the defendants were (or were not) involved in the plaintiffs' alleged injuries.

For purposes of the present motion, dismissal is required because Plaintiffs have the burden of establishing justiciability and have not claimed a need for further discovery. If this case is not dismissed at this juncture, CACI PT will be entitled to discovery from the United States to fully address justiciability, which may implicate state secrets depending on the United States' willingness to provide discovery regarding Plaintiffs' experiences and Abu Ghraib operations. *See Abilt v. CIA*, 848 F.3d 305, 314 (4th Cir. 2017).[4]

B. Plaintiffs' Allegations Are Not Cognizable Under the Alien Tort Statute

Putting aside that Plaintiffs do not claim mistreatment by a CACI PT employee, Plaintiffs' allegations, taken as true, simply do not rise to the level of torture, CIDT, or war crimes. Plaintiffs' initial response is to challenge the definitions of torture, CIDT, and war crimes used by CACI PT, but CACI PT applied the definitions Plaintiffs requested and the Court adopted. *Compare* Dkt. #577 at 8-19 *with* Dkt. #615 at 8, 14, 15. Application of these definitions shows that Plaintiffs' allegations do not state a viable claim.

Indeed, the U.S. cases Plaintiffs cite illustrate the chasm between allegations that qualify as torture, CIDT, or war crimes and the allegations at issue here.[5] The contrast is even more

[4] At the Court's recommendation, CACI PT communicated its discovery needs to the United States. Supplemental O'Connor Decl., Ex. 24.

[5] *Yousuf v. Samantar*, No. 1:04-cv-1360, 2012 U.S. Dist. LEXIS 122403 at *18-*28 (E.D. Va. 2012) (locked in room without food or water for two days, bound and held on his back with water forced into his mouth and air passageways cut off until he lost consciousness on at least four or five different occasions, electric shocks to armpits, solitary confinement for seven years; two other men nearly killed in mass executions); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845-46 (11th Cir. 1996) (woman forced to undress, bound, and whipped with wire and repeatedly threatened with death; another woman forced to undress, bound, hung from a pole, severely beaten, water poured into wounds to increase pain, permanent scars; third woman forced to undress, arms and legs bound, hung by a pole, severely beaten, sister taken and never returned);

pronounced in the international cases. Three of the international cases Plaintiffs rely upon deal with Bosnian detention facilities in which detainees perished from the inhumane conditions or violence, including systematic gang rape and murder.[6] One case involved a 17-year-old girl who was kept blindfolded and isolated from her family, stripped naked, raped, beaten, slapped, threatened, and pummeled with high-pressure water while being spun around in a tire.[7] Plaintiffs' allegations do not compare. Consequently, Plaintiffs resist application of their requested definitions to avoid confronting the weakness of their claims.

Plaintiffs' argument that aggregating their various allegations of mistreatment together somehow transforms them into torture or CIDT (Pl. Opp at 2, 16-19) misconstrues CACI PT's analysis and is in any event unavailing. CACI PT does not dispute that the Court should "view the facts 'holistically, with an eye to the full factual context.'" *Velasquez v. Sessions*, ___ F.3d

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Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (severe beatings "[e]very little while" for a month done with hands, feet and a thick electrical cable, more severe beating upon second arrest with "lots of monstrosities" in it, including being burned with cigarettes); *Surette v. Islamic Rep. of Iran*, 231 F. Supp. 2d 260, 263-65 (D.D.C. 2002) (chained immobile to the floor, denied sufficient food or water, severely limited access to toilet facilities causing excruciating pain and defecation on self, death threats and mock executions, likely use of a catheter and intravenous tubes to inflict extreme pain, deliberately killed); *Daliberti v. Rep. of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001) (one confined for eleven days without water, a toilet, or a bed; another confined for four days in the dark in similar conditions and threatened with electrocution); *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995) (CACI PT Mem. at 22); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002) (CACI PT Mem. at 21-22); *see also Warfaa*, 33 F. Supp. 3d at 657 (plaintiff bound, stripped, beaten to unconsciousness at least nine times, and shot five times after being interrogated) (TVPA case).

[6] *See, e.g.*, *Prosecutor v. Krnojelac*, Case No. IT-97-25-I, Trial Judgment, Mar. 15, 2002, ¶ 7 (accused participated in the murder and beating deaths of multiple detainees); *Prosecutor v. Kvocka et al.*, No. IT-98-30/1-T, Trial Judgment, Nov. 2, 2001, ¶ 116; *Prosecutor v. Kunarac*, Case No. IT-96-23-A, Appeal Judgment, June 12, 2002, ¶¶ 2-3 (offenses committed in a military campaign and other non-camp detention sites); *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Chamber, Dec. 10, 1998 (accuseds interrogated naked female victim at non-camp site, rubbed her inner thigh with a knife and threated to cut out her genitalia, repeatedly raped her orally, vaginally, and anally before an audience of soldiers).

[7] *Aydin v. Turkey*, No. 57/1996/676/866, ¶¶ 83-84 (E.Ct.H.R. Sept. 25, 1997).

___, 2017 WL 3221643, at *3 (4th Cir. 2017) (quoting *Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015)). But Plaintiffs have not alleged facts showing their alleged mistreatment to be part of a systematic process. Plaintiffs allege discrete acts of mistreatment at different times, by different actors, and in different contexts. A soldier who trips a detainee has acted inappropriately, but he is not converted into a *torturer* if others happen to have engaged in mistreatment of the same detainee at other times and in other places. Indeed, like CACI PT, the Court found it analytically useful to evaluate allegations of mistreatment by type.[8] Plaintiffs cite no cases that prohibit this type of logical breakdown. Regardless, even taken as a whole, Plaintiffs' allegations simply do not rise to the level of conduct necessary to state claims of torture or CIDT.

1. Plaintiffs Fail to State a Claim for Torture

Plaintiffs accuse CACI PT of "excis[ing] '*mental* pain or suffering' out of the definition of torture." Pl. Opp. at 2. But CACI PT applied the definition Plaintiffs proposed and the Court adopted, under which "severe mental pain or suffering" *requires* "prolonged mental harm" from:

> (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). Plaintiffs have not raised allegations related to mind-altering substances or threats against another person.[9] The only allegation that could be characterized as a death threat

[8] 12/16/16 Tr. at 17 ("I think for each of these plaintiffs, you've alleged at least eight or nine specific types of mistreatment. If there are one or two that in your view are slam-dunks, you know, you make the case a lot simpler to just go with those two, jettison the other ones and, you know, focus on those.").

[9] A guard allegedly told Al Shimari he would bring Al Shimari's wife to the prison. CACI PT Mem. at 23. Al Shimari does not allege a threat of imminent death, severe pain or

is that a guard allegedly threatened to shoot Al Shimari with a bullet. Al Shimari Dep. at 100. But, as explained in CACI PT's opening brief, this alleged threat does not qualify as CIDT let alone torture. CACI PT Mem. at 23-24. Thus – exactly as CACI PT described – the only *relevant* definition of severe mental pain or suffering requires severe physical pain or suffering. *Id.* at 14.

Indeed, Plaintiffs describe no instances of severe mental pain or suffering that meet the statutory definition even if the requisite severe physical pain or suffering had been present. Plaintiffs assert that their purported "prolonged mental harm" stemmed from exploitation of their fear of dogs, forced nudity, and sleep deprivation. *Id.* at 20. But these exact tactics were expressly approved by the Secretary of Defense for use at Abu Ghraib and thus cannot support Plaintiffs claims. Ex. 7 at xxii-xxiv (approval of "exploitation of detainee fears (such as fear of dogs), removal of clothing," and "sleep deprivation" among other tactics). Plaintiffs also assert that instances of solitary confinement[10] and "breaking of sexual taboos or sexual abuse for cultural reasons" caused them mental harm. Pl. Opp. at 20. But those allegations do not involve "the intentional infliction or threatened infliction of severe physical pain or suffering," or meet the other statutory criteria. 18 U.S.C. § 2340(2). As such, none of Plaintiffs' allegations constitute torture based on severe mental pain or suffering.

Plaintiffs claim that CACI PT's definitions of torture and CIDT "demand[] a showing of 'risk of death,' 'burn or disfigure[ment]' or 'impair[ment] the function of any body part,' sets the 'physical pain' threshold for torture and CIDT at a level akin to the discredited "organ failure or

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suffering, or administration of mind-altering substances. Al Shimari Dep. at 90. Plaintiffs assert that Al Ejaili "was repeatedly threatened with harm to himself and his family." Pl. Opp. at 6. But he did not testify to any threats against his family during his deposition.

[10] Al Ejaili alleges he was put in a dark room by himself for 1½ days. *Compare* Al Ejaili Dep. at 218 *with Yousuf*, U.S. Dist. LEXIS 122403 at *21 (solitary confinement for seven years until Yousuf questioned whether he could speak his native language amounted to torture).

death" threshold." Pl. Opp. at 2, 22.[11] But this is not CACI PT's definition – it is the definition adopted by Congress *and embraced by this Court*. The Court recognized that torture and CIDT are "conceptually linked," Dkt. #615 at 12, and the "gradations . . . are marked only by the degrees of mistreatment the victim suffers, by the level of malice the offender exhibits and by evidence of any aggravating or mitigating considerations that may inform a reasonable application of a distinction." *Id.* at 12-13. Under the statutory definition dictated by the Court, the "serious physical pain or suffering," necessary to establish a claim for the lesser claim of CIDT, requires a "bodily injury" involving "(i) *a substantial risk of death*; (ii) *extreme physical pain*; (iii) a *burn or physical disfigurement of a serious nature* (other than cuts, abrasions, or bruises); or (iv) *significant loss or impairment of the function of a bodily member, organ, or mental faculty*." 18 U.S.C. § 2441(d)(2)(D) (emphasis added). Thus, by holding Plaintiffs to this standard for torture, CACI PT demanded a lower burden than Plaintiffs are required to shoulder. *See* 18 U.S.C. § 2340 and 28 U.S.C. § 1350 (note) (requiring *severe* pain or suffering); *see also* Pl. Opp. at 20-21 ("severe" suffering is the "touchstone" of the torture definition).

Plaintiffs attack CACI's reliance on *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), claiming the case provides a description not a "definitional floor" for torture. Pl. Opp. at 20. Not so. In *Price*, the court emphasized, "The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim." *Id.* at 92. "The *more* intense, lasting, or heinous the agony, the more likely it is to be torture." *Id.* at 93 (quoting S. EXEC. REP. NO. 101-30, at 15 ("*[I]n order to constitute torture*, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature,

[11] Plaintiffs' citations to subsequent condemnation of OLC memos never referenced by CACI PT are irrelevant. Pl. Opp. at 22 n.21. They are a blatant attempt to inject politics into a matter easily decided by reference to the language of the operative statutes.

specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.") (internal quotation marks omitted)) (emphasis added). Based on this threshold, below which conduct is not torture, the court concluded that "torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault" and that "[n]ot all police brutality, not every instance of excessive force used against prisoners, is torture." *Id.*

Plaintiffs accuse CACI PT of mischaracterizing *Price* as finding the severity of the allegations lacking, when all that was lacking were details about the assaults. Pl. Opp. at 21. But CACI PT accurately described *Price* as holding that the "allegations of 'kicking, clubbing, and beatings' were insufficient to permit the court to assess the severity of the plaintiffs' pain and suffering." CACI PT Mem. at 15. CACI PT correctly stated that to "satisfy the 'rigorous' torture definition, the court required additional information regarding the beatings' 'frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out.'" *Id.* The import of *Price* was not unclear.

Plaintiffs try to rely on the findings made by the district court on remand in *Price* to suggest a low threshold for finding mental torture. Pl. Opp. at 21. But Plaintiffs ignore the severity that rendered the acts torture. In *Price*, the plaintiffs were forced to watch as prison guards broke every bone in a man's body with a rubber truncheon and then put a hammer through his skull, killing him, because he had shared food with them. *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 125 (D.D.C. 2005). They watched as guards used a hammer systematically to break the toes, fingers, feet, and arms of a friend until he lay unconscious and appeared dead, surrounded by blood. *Id.* They were forced to watch as another prisoner was beaten because he had spoken with them. *Id.* The plaintiffs were told they would receive the same treatment if they did not confess. 274 F. Supp. 2d at 20, 25 (D.D.C. 2003).

They were subjected to multiple beatings a day, beaten with truncheons and sticks, lashed on the feet with iron barbs, and subjected to mock executions. *Price*, 384 F. Supp. 2d at 125-28. Each plaintiff sustained significant, permanent injuries. *Id.* at 124. ***That*** is torture. Any comparison between Plaintiffs' alleged mistreatment and the shocking brutality in *Price* is spurious.

On the same page Plaintiffs offer their strained description of *Price*, Plaintiffs accuse CACI PT of mischaracterizing other cases, which Plaintiffs claim did not hold "that the relevant conduct did not meet the statutory definition of torture" but instead addressed allegations of persecution. Pl. Opp. at 21 n.18. Plaintiffs ignore that the definition of persecution includes torture; therefore, if a court concludes that a petitioner was not persecuted, it necessarily concludes that she was not tortured. *See Tang v. Lynch*, 840 F.3d 176, 180 (4th Cir. 2016) ("Persecution takes the form of 'threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.'") (quoting *Singh v. Holder*, 699 F.3d 321, 332 (4th Cir. 2012)). In *Ahmed v. Keisler*, the court evaluated whether the petitioner met the criteria to avoid deportation under the Convention Against Torture ("CAT") by demonstrating that he was likely to be tortured if removed to a proposed country. 504 F.3d 1183, 1200 (9th Cir. 2007). Examining prior occasions of being beaten while in custody, the court concluded, "it is not clear that these actions would rise to the level of torture." *Id.* In *Djonda v. United States AG*, 514 F.3d 1168 (11th Cir. 2008), the immigration judge denied relief where the petitioner was forced to disrobe, beaten with a belt and kicked, and threatened. *Id.* at 1171. The court of appeals did not consider relief under the CAT, but declined to find that Djonda had suffered past persecution. *Id.* at 1174. In *Cai Luan Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004), the court found no persecution and explained that torture "qualif[ies] as persecution under the prevailing definition of the term." *Id.* at 233, 235. Notably, Plaintiffs twice rely on *Al-Saher v. INS*, 268

F.3d 1143, 1145-48 (9th Cir. 2001), which, like the above cases, examined persecution and torture in the context of relief from removal to a proposed country. Pl. Opp. at 18, 28.

2. Plaintiffs Fail to State a Claim for CIDT

Plaintiffs accuse CACI PT of misstating the definition of CIDT because it applied section (d) of the War Crimes Act. Pl. Opp. at 22-23. But Plaintiffs' quibble is not with CACI PT; rather, Plaintiffs quarrel with themselves and the Court. It was Plaintiffs – not CACI PT – who proposed using the War Crimes Act and specifically section (d) to define CIDT. Dkt. #577 at 15 (citing 18 U.S.C. § 2441(d)(1)(B)). The Court accepted Plaintiffs' proposed definition and expressly defined CIDT using 18 U.S.C. § 2441(d)(1)(B). Dkt. #615 at 14. CACI PT applied the standard advocated by the Plaintiffs and recognized by the Court.

Rejecting their once-preferred definition because they cannot meet it, Plaintiffs now ask the Court to change its mind and for allegations involving sexual acts rely on a new definition provided by a 2006 U.N. report on Guantánamo Bay, which Plaintiffs optimistically characterize as "the *law* in effect in 2003-04." Pl. Opp. at 23. This request should be rejected. Two paragraphs that reference degrading treatment – but do not discuss CIDT (referenced elsewhere in the report) – from a U.N. report that was completed in 2006 and addressed conditions at Guantánamo Bay are in no way authoritative on the definition of CIDT or what acts occurring at Abu Ghraib in 2003 and 2004 come within its bounds. Plaintiffs' claims do not meet the statutory definition they proposed and the Court imposed and, therefore, they must be dismissed.

3. Plaintiffs Fail to State a Claim for War Crimes

Plaintiffs do not dispute that a war crime claim requires a showing of "serious bodily harm" and that the definition of "serious bodily harm" is substantively identical to the definition the Court recognized for use in this case for CIDT. CACI PT Mem. at 26. Thus, because none of Plaintiffs' claims constitute CIDT, none constitute war crimes.

Plaintiffs object instead to the elements for war crimes set forth in *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 589 (E.D. Va. 2009) ("*In re Xe*"), and accepted by this Court, *see Al Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 452 (E.D. Va. 2015). Plaintiffs attempt to distinguish *In re Xe* by urging that it "involved decisions regarding who could be targeted for attack." Pl. Opp. at 23. But the court derived the standard directly from the Fourth Geneva Convention and made no such distinction when describing the elements based on that standard. *In re Xe*, 665 F. Supp. 2d at 582-83. Plaintiffs argue that all detainees are entitled to protection from war crimes like torture and CIDT, Pl. Opp. at 23, and that is certainly true. As described by the Court, neither torture nor CIDT claims require a demonstration of innocence by Plaintiffs. *See* Dkt. 615 at 8, 14. That does not change the fact that innocence is a necessary element to state an ATS claim for war crimes. *In re Xe*, 665 F. Supp. 2d at 589. In an attempt to bypass this element, Plaintiffs cite a footnote in an unpublished case from the Northern District of Alabama in which the district court failed to identify *In re Xe*[12] and, in any event, declined to decide whether civilian status was a required element for a war crime claim under the ATS. *Id.* Conversely, two separate courts in this district – one in this very case – have published opinions accepting this standard. The Court should not now choose to ignore it.

C. Plaintiffs' Allegations Fail to Satisfy the *Twombly/Iqbal* Standard

Plaintiffs admit that "the gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting." Pl. Opp. at 31 n.30. With no allegation that they were mistreated by CACI PT employees, Plaintiffs effectively concede the propriety of dismissing their direct counts (Counts I, IV, and VII). Plaintiffs' conspiracy and aiding and abetting counts fare no better. In moving

[12] *Doe v. Drummond Co.*, No. 2:09-CV-01041, 2010 U.S. Dist. LEXIS 145386, *26-*27 n.16 (N.D. Ala. Apr. 30, 2010) ("But this court *can find* no authority for the contention that . . . civilian status is an element of a war crimes claim. Regardless, the question . . . *need not be decided here*.") (emphasis added).

to dismiss, CACI PT relied on Supreme Court and Fourth Circuit law to show that no Fourth Circuit case has found conspiracy or aiding and abetting claims as bereft of facts as the TAC to pass muster under the *Twombly/Iqbal* standard. CACI PT Mem. at 30-35. The Court should decline Plaintiffs' invitation to make an exception to the well-established rules of pleading.

The viability of Plaintiffs' conspiracy and aiding and abetting claims is controlled by a straightforward legal question:

> Does an allegation that a small number of CACI PT employees gave guards instructions regarding the treatment of a few out of the thousands of detainees at Abu Ghraib prison create a plausible claim that CACI PT or its employees entered into a conspiracy to mistreat these Plaintiffs?

Ten years of binding precedent emphatically answers that question in the negative. Plaintiffs' claims are built on nothing more than conjecture, sequences of disparate events and tacked-on labels. There are no specific facts from which the Court can plausibly infer a conspiracy.

CACI PT cited a wealth of Fourth Circuit precedent requiring that a conspiracy claim plausibly allege facts showing (1) that the conspirators positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan; (2) participation in the conspiracy by each defendant; (3) for alleged corporate conspirators, entry into the conspiracy by an officer with power to bind the corporation; (4) facts other than parallel conduct, as allegations of parallel conduct do not permit an inference of conspiracy; and (5) a motive for each defendant to join the conspiracy. CACI PT Mem. at 27-29 (citing cases).

The TAC, however, does not allege *facts* concerning actual entry into a conspiracy by CACI PT or CACI PT employees. Rather, the TAC relies on deposition testimony from MPs to the effect that a few CACI PT employees gave MPs instructions regarding treatment of detainees. TAC ¶¶ 85, 98-101. But these same deponents were very clear that (1) military interrogators also gave MPs instructions regarding detainee treatment, and (2) when interrogators

gave MPs instructions, they were limited to the treatment of a specific detainee assigned to that interrogator. Ex. 4 at 185-86, 208-09, 226-27, 230; Ex. 5 at 53-56.

Thus, Plaintiffs' allegation of entry into a conspiracy by CACI PT or its employees is based entirely on allegations of parallel conduct: that a few CACI PT interrogators gave instructions to MPs *regarding treatment of detainees other than Plaintiffs*, so any mistreatment of Plaintiffs was the product of a conspiracy that included these CACI PT interrogators. But the law in this Circuit is clear that allegations of parallel conduct fail as a matter of law to create an inference of conspiracy. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *Thomas v. Salvation Army S. Territory*, 841 F.3d 632, 637 (4th Cir. 2016); *SD3 v. Black & Decker (U.S.), Inc.*, 801 F.3d 412, 437 (4th Cir. 2015); *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 280 (4th Cir. 2012); *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011). Moreover, even if Plaintiffs could allege that *CACI PT or its employees* entered into a conspiracy, they have alleged no facts showing that whoever allegedly mistreated Plaintiffs was also part of that conspiracy. Plaintiffs are proceeding on the theory that anyone who mistreated anyone at Abu Ghraib prison was a conspirator, which is a classic allegation of parallel conduct. *See, e.g.*, *Twombly*, 550 U.S. at 556-57.

In response, Plaintiffs begin by suggesting that the Court should deny CACI PT's motion because "[t]his is at least CACI's third attempt to dismiss Plaintiffs' conspiracy claims, and it raises no new arguments." Pl. Opp. at 30. But the last time the Court considered a CACI PT motion to dismiss Plaintiffs' conspiracy claims, ***the Court granted the motion***. Dkt. #215.[13]

[13] The first time that CACI PT sought dismissal of Plaintiffs' conspiracy claims was *nine years ago* in connection with the Amended Complaint. CACI PT filed that motion shortly after the Supreme Court decided *Twombly* but before it had decided *Iqbal*, at a time when there was virtually no Fourth Circuit precedent applying the *Twombly/Iqbal* standard. Dkt. #28. By the time CACI PT moved to dismiss the conspiracy claims in the Second Amended Complaint in

Thus, this is not a case of CACI PT recycling previously-rejected arguments, but one of CACI PT reasserting arguments ***that this Court found meritorious***. Plaintiffs' opposition essentially ignores this Court's order dismissing the conspiracy claims in the Second Amended Complaint and makes no effort to argue that it has cured the defects that led to the dismissal of those claims.

On the merits, Plaintiffs largely ignore the well-developed body of precedent regarding the pleading requirements for conspiracy claims, relying instead on an unpublished 1994 decision applying the pre-*Twombly/Iqbal* standard, and a 2010 decision from another Circuit that is not particularly on point.[14] Plaintiffs' decision not to rely on binding precedent is unsurprising because these precedents require dismissal of Plaintiffs' conspiracy claims.

Perhaps recognizing the absence of facts showing entry by CACI PT into a conspiracy, Plaintiffs' opposition retreats to the alternative argument that maybe CACI PT *employees* entered into a conspiracy and CACI PT is liable on a *respondeat superior* theory. Pl. Opp. at 37.[15] This theory has the same flaws as Plaintiffs' allegations regarding CACI PT as a supposed conspirator – Plaintiffs' allegations that CACI PT interrogators gave instructions regarding the treatment *of their assigned detainees* is insufficient as a matter of law to support an inference that any person who mistreated Plaintiffs (or instructed others to mistreat Plaintiffs) did so as part of a

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2013, the Fourth Circuit had decided a number of conspiracy cases applying the *Twombly/Iqbal* standard and this Court correctly held that Plaintiffs' allegations were insufficient.

[14] Pl. Opp. at 33 (citing *Tysons Toyota v. Global Life Ins. Co.*, No. 93-1359, 1994 U.S. App. LEXIS 36692 (4th Cir. Dec. 29, 1994)); Pl. Opp. at 35-36 (citing *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010)).

[15] Plaintiffs' theory of the so-called "torture conspiracy" has been a moving target. The original theory involved a large-scale conspiracy including Cabinet officials, other high-ranking executive-branch officials, and soldiers ranging from generals to privates. Over time, Plaintiffs jettisoned the executive-branch officials and high ranking soldiers. *See* Ex. 1 at Int. 6. Now, the alleged conspiracy includes only low-ranking soldiers and CACI PT interrogators. TAC ¶ 78. The contours of the alleged conspiracy are important, however, because if Plaintiffs seek to hold CACI PT liable for the acts of alleged conspirators, it helps to know who those conspirators are.

conspiracy with CACI PT employees. In addition, there is no legal basis for stacking *respondeat superior* liability on top of co-conspirator liability to hold CACI PT liable for the actions of its employees' alleged co-conspirators. Indeed, the two cases CACI PT has been able to locate on this issue both reject Plaintiffs' theory of "vicarious liability squared." *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768, 777 (9th Cir. 2002); *Day v. DB Capital Group, LLC*, No. DKC 10-1658, 2011 WL 887554, at *21 (D. Md. Mar. 11, 2011). Plaintiffs' opposition misdescribes these cases as being limited to their facts and applicable only when the employees are acting *outside* the scope of their employment. Neither contention is accurate.

Oki Semiconductor explained that *respondeat superior* liability is based in part on the employer's duty to monitor its employees. 298 F.3d at 777. Employers cannot be liable for the actions of employees' co-conspirators because the employer cannot reasonably monitor their actions. *Id.* Contrary to Plaintiffs' intimation, the employees in *Oki Semiconductor* were not acting outside the scope of their employment; if they were, the employer would not have been liable for even its own employees' conduct. *Id.* Notably, the cases cited by Plaintiffs involve an employer's liability *for its own employees' conduct*, and are not on point. *See* Pl. Opp. at 38-39.

Thus, *if* one or more of CACI PT's employees had entered into a conspiracy, was found to be acting within the scope of his employment, and had directed the mistreatment of one of these Plaintiffs, *Oki Semiconductor* and *Day* would not bar that claim. These cases would, however, bar a claim that some member of the conspiracy *other than a CACI PT employee* directed the mistreatment of one of the Plaintiffs, as CACI PT cannot be held liable for the conduct of persons with whom CACI PT employees theoretically might have conspired. Because Plaintiffs have not alleged facts to the effect that any CACI PT employee mistreated *them*, or directed others to mistreat *them*, they cannot maintain conspiracy claims against CACI

PT on the theory that CACI PT is liable for the conduct of its employees' supposed co-conspirators.

Plaintiffs argue that CACI PT's motion to dismiss Plaintiffs' aiding and abetting claims is procedurally barred under Federal Rule of Civil Procedure 12(g) because CACI PT only moved to dismiss Plaintiffs' conspiracy claims in 2013. Pl. Opp. at 40. But Plaintiffs' prior motion to dismiss was denied as moot based on the Court's entry of judgment. Dkt. #460. CACI PT is not filing serial Rule 12 motions in an effort to obtain multiple rulings from the Court, and the Court directed CACI PT to raise any Rule 12 arguments it desired (Dkt. #615 at 17). Moreover, even if Rule 12(g) could apply when the first motion to dismiss was denied as moot, courts regularly permit successive Rule 12 motions when efficiency dictates.[16] Indeed, Rule 12(h) provides that even if the Court held that a Rule 12(b)(6) motion were procedurally barred on aiding and abetting, CACI PT could file a Rule 12(c) motion for judgment on those claims. Fed. R. Civ. P. 12(h)(2)(B). That is exactly the type of serial motions practice Rule 12(g) is designed to avoid.

Plaintiffs' aiding and abetting claims are essentially duplicative of their conspiracy claims. Plaintiffs do not allege any facts as to how CACI PT supposedly assisted whoever might have mistreated Plaintiffs. Mere labels and conclusions that CACI PT assisted these unidentified persons does not pass muster under the *Twombly/Iqbal* pleading standard.

[16] *See, e.g.*, *Ennenga v. Starns*, 677 F.3d 766, 772-73 (7th Cir. 2012); *Brown v. City of Essex*, No. 10-3980, 2011 WL 3610268, at *3 (D.N.J. Aug. 11, 2011); *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 383-84 (D. Md. 2009); *Tatum v. R.J. Reynolds Tobacco Co.*, No. 02–373, 2007 WL 1612580, at *5-6 (M.D.N.C. May 31, 2007); *Mylan Labs., Inc. v. Akzo*, 770 F. Supp. 1053, 1059 (D. Md. 1991); *In re Westinghouse Sec. Litig.*, No. 91-354, 1998 WL 119554, at **6, 23-24 (W.D. Pa. Mar. 12, 1998); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1095 n.3 (D. Md. 1979) ("A complaint is always vulnerable to a challenge for legal sufficiency[, and] it is far more efficient to treat the arguments prior to more extensive discovery.").

D. Plaintiffs' Claims Are Preempted By Federal Law and CPA Order 17

Plaintiffs argue that Constitutional and statutory preemption "only operates to displace *state* laws." Pl. Opp. at 41. But it has been the law at least since *Marbury v. Madison* that the Constitution limits Congress's power to legislate. Moreover, the Supreme Court has specifically held that federal statutes can displace causes of action under federal common law. *Am. Elec. Power Co. v. Massachusetts*, 564 U.S. 410, 423 (2011); *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981). Indeed, it is the position of the United States that the TVPA limits federal courts' power to recognize causes of action under the ATS. CACI PT Mem. at 44. Plaintiffs apparently have no response to this body of case law, as they simply ignore it. Moreover, Plaintiffs admit that the D.C. Circuit has found that the Constitution and the combatant activities exception to the FTCA preempt ATS claims under identical facts to those at issue here. Pl. Opp. at 42 (citing *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009)). Thus, Plaintiffs' big-picture argument that the Constitution and federal statutes never displace federal law is demonstrably incorrect.

Turning to CACI PT's specific displacement arguments, Plaintiffs' try to wave off CACI PT's Constitutional and combatant activities preemption argument by contending that the federal preemption decision in *Saleh* was *dicta* and incorrect. Notably, Plaintiffs do not distinguish *Saleh* or argue that the facts required by the D.C. Circuit for preemption of ATS claims are not established. Indeed, the Fourth Circuit endorsed the "ultimate military control" test applied by the D.C. Circuit in *Saleh*. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2014). Moreover, contrary to Plaintiffs' argument, the preemption of ATS claims in *Saleh* was not *dicta*, but was one of two independent grounds for dismissal of the plaintiffs' ATS claims. *Saleh*, 580 F.3d at 17. Plaintiffs do not dispute that the core facts that supported judgment in *Saleh* are present here, nor could they, as both cases arise out of the same operative facts.

With respect to CPA Order 17, Plaintiffs assiduously avoid any treatment of the actual language of the order, as that language supports CACI PT's position and not Plaintiffs'. CACI PT Mem. at 41. Plaintiffs instead rely on a single case addressing the language of a subsequent version of CPA Order 17 that is not applicable here, and do not even analyze the actual language of *that* order. Language matters in construing laws. *United States v. Ashford*, 718 F.3d 377, 382 (4th Cir. 2013) (courts construe laws by giving effect to their plain meaning).

Finally, as noted above, Plaintiffs argue that the TVPA does not delimit federal courts' power to recognize torture claims under the ATS, but simply ignore the United States' contrary position and Supreme Court precedent holding that legislation occupying a field limits federal courts' common-law power to recognize causes of action. CACI PT Mem. at 42-44.[17]

III. CONCLUSION

For the foregoing reasons, the Court should dismiss the Third Amended Complaint.

Respectfully submitted,

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[17] Plaintiffs' argument that CACI PT "waived" its right to file a Rule 12(b)(6) motion on preemption, and would have to file a separate Rule 12(c) motion, is incorrect for the reasons addressed in connection with Plaintiffs' aiding and abetting claim. See Section II.C, *supra*.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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